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IN THE

# Supreme Court of the United States

MORGAN STANLEY CAPITAL GROUP, INC.,
AND
CALPINE ENERGY SERVICES, L.P., ET AL.,
*Petitioners*,

v.

PUBLIC UTILITY DISTRICT NO. 1
OF SNOHOMISH COUNTY, WASHINGTON, ET AL.,
*Respondents*.

**On Writs of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

## BRIEF OF POWEREX CORP., AVISTA CORPORATION, IDAHO POWER COMPANY, PPL ENERGYPLUS, LLC, PPL MONTANA, LLC, PUGET SOUND ENERGY, INC., SEMPRA ENERGY TRADING LLC, TRANSALTA ENERGY MARKETING (US) INC., AND TRANSCANADA ENERGY LTD. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* buy and sell wholesale electricity in markets regulated by the Federal Energy Regulatory Commission ("FERC" or "Commission"). As participants in Western power markets during the 2000-2001 energy crisis, *amici* experienced firsthand the volatility and disruption visited upon California and other Western States when a confluence of circumstances caused prices to rise and shortages to occur in those markets. *Amici* have been involved in numerous proceedings arising from the energy crisis before FERC and the Ninth Circuit, and they have a substantial interest in correcting the erroneous course that the Ninth Circuit has charted through a series of decisions, of which this case, *Public Utility District No. 1 of Snohomish County v. FERC*, 471 F.3d 1053 (9th Cir. 2006) ("*Snohomish County*"), is but one example.

In *Snohomish County*, the Ninth Circuit abandoned decades-old precedent and expanded FERC's authority under the *Mobile-Sierra* doctrine to abrogate voluntary, bilateral contracts between sophisticated market participants. Abandonment of the *Mobile-Sierra* doctrine has the potential to have devastating effects on Western electricity markets and this country's energy supply. The doctrine was

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of the brief. All parties have consented to the filing of this brief. The petitioners in No. 06-1462 and respondent Mirant Energy Trading LLC have filed letters granting blanket consent to the filing of *amicus* briefs. Letters reflecting the consent of the petitioner in No. 06-1457 and the remaining respondents to the filing of this brief have been filed with the Clerk.

developed and has been successfully applied over many decades to serve sound policy goals. It ought not be set aside.

Even more dangerous than this single case is the growing body of fundamentally flawed Federal Power Act ("FPA") jurisprudence that set the stage for *Snohomish County* and that the Ninth Circuit continues to apply today. The Ninth Circuit laid the foundation in *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, 127 S. Ct. 2972 (2007), strengthened it in *Public Utilities Commission v. FERC*, 462 F.3d 1027 (9th Cir. 2006) ("*PUC*"), which reviewed FERC's California refund proceeding, and extended it most recently in *Port of Seattle v. FERC*, 499 F.3d 1016 (9th Cir. 2007), which reviewed FERC's Pacific Northwest ("PNW") refund proceeding. In light of the interrelation between long-term contracts, Western power markets, and FERC's broad-based review of the energy crisis, *amici* urge the Court to be mindful that the Ninth Circuit's erroneous *Mobile-Sierra* holding arises in the context of a series of other incorrect Ninth Circuit decisions. That broader context is important for the Court to appreciate the Ninth Circuit's error in this case and the relief that should be afforded to petitioners.

*Snohomish County*, and the Ninth Circuit's energy-crisis jurisprudence on which it is based, rest on two principles that are fundamentally inconsistent with the FPA and this Court's cases. First, the Ninth Circuit has created for FERC an "effective oversight" obligation that the court has used to justify standardless judicial intrusion into matters firmly within FERC's administrative discretion. Second, and related, the court has applied that vague

"effective oversight" requirement to expand parties' refund liability well beyond what the FPA provides, thereby upsetting the careful balance that Congress crafted in the FPA between contractual certainty and consumer protection.

Contrary to the Ninth Circuit's apparent belief, FERC responded quickly and competently to the energy crisis and its aftermath. It actively supervised power markets and created regulatory protections that sped the recovery of Western markets. It also investigated numerous allegations of wrongdoing by market participants and ordered refunds and other remedies when appropriate. Its efforts and expert knowledge should not have been cast aside by the Ninth Circuit under the guise of "effective oversight" that is little more than judicial second-guessing designed to enable remorseful buyers to evade legitimate contractual commitments. Continued application of the "effective oversight" requirement will have devastating effects on Western electricity markets and this country's energy supply.

## STATEMENT

### California's Wholesale Electricity Market

In the mid-1990s, retail electricity rates in California were nearly twice the national average and rising.[2] In response, California conducted an "aggressive market experiment" that comprehensively reformed its electric energy industry, moving from a cost-based rate system to a more market-based rate system. *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 835, *amended on other grounds on denial of reh'g*, 387 F.3d 966 (9th Cir. 2004), *cert. denied*, 544 U.S. 974 (2005). The end result "was the most complicated set of wholesale electricity market institutions ever created on earth and with which there was no real-world experience." Paul L. Joskow, *California's Electricity Crisis*, 17 Oxford Rev. Econ. Pol'y 365, 370 (2001).

The California Public Utilities Commission ("CPUC") issued an order[3] and the California Legislature unanimously passed a bill[4] that, together, restructured the California electricity market. *See* Pet. App. 20a.[5] The legislation created the California Power Exchange Corporation ("PX"), which operated "a single-day auction for day-ahead and day-of trading in wholesale electricity, known as the 'spot

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[2] *See* W. Lynn Garner, *California Rides the Tiger*, Public Utilities Fortnightly, Jan. 1, 1995, at 20.

[3] *Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation*, D. 95-12-063, 1995 Cal. PUC LEXIS 1034 (CPUC Dec. 20, 1995), *modified by* D. 96-01-009, 1996 Cal. PUC LEXIS 22 (CPUC Jan. 10, 1996).

[4] Act of Sept. 23, 1996, 1996 Cal. Legis. Serv. 854 (A.B. 1890) (West) (codified at Cal. Pub. Util. Code §§ 330-397 (West 1998)).

[5] References to "Pet. App." are to the appendix filed in No. 06-1457.

market,'" as well as "a 'forward market' to facilitate long-term wholesale electricity contracts." *Id.* at 23a.[6] The legislation also created the California Independent System Operator Corporation ("ISO"), which managed the transmission network for most of California, including a "real-time" or "spot" market used to balance supply and demand for energy at precise points in time. *See generally Public Util. Dist. No. 1 of Snohomish County v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 759 (9th Cir. 2004) ("*Dynegy*"), *cert. denied*, 545 U.S. 1149 (2005); *Lockyer*, 383 F.3d at 1008-09.

At the core of the restructuring plan was the requirement that California's three major vertically integrated investor-owned utilities ("IOUs") liquidate their gas-based generation facilities, sell their remaining generation capacity into the PX spot market, and purchase all of the electricity needed to serve their retail customers in the ISO and PX spot markets. *See Lockyer*, 383 F.3d at 1008-09 & n.2. To help the IOUs recover stranded costs resulting from the sales of their generation facilities, the California legislature froze some retail rates "at a level utilities expected to be far above rates [they] were likely to have to pay." Pet. App. 23a n.12. As history shows, the combination of forced reliance on wholesale spot prices with retail rate freezes ultimately proved to be disastrous during 2000-2001.

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[6] As the court below explained, "[t]he term 'spot market' refers to deals for energy provided over periods generally not exceeding 24 hours and entered into the day of or day prior to delivery. It contrasts with the term 'forward market,' in which energy is delivered some time beyond 24 hours after sale." Pet. App. 23a n.14.

**The Western Power Market and the Energy Crisis**

California's electricity markets exist within the West's broader interconnected region. Unlike in California, participants in other Western markets generally enter voluntary, bilateral contracts. *See Port of Seattle*, 499 F.3d at 1023; Pet. App. 25a. The West relies heavily on hydroelectric power, and for decades hydroelectric utilities in the Pacific Northwest have engaged in seasonal exchanges with California, whereby energy is supplied to the south in the summer months and to the north in the winter months.[7] As a result, California's reliance on imports from the West's hydropower resources has posed challenges for the State during years of drought, when low-water reserves decrease hydropower production.

Initially, California's restructured markets performed well. *See* Order on Complaint, *California ex rel. Lockyer v. British Columbia Power Exch. Corp.*, 99 FERC ¶ 61,247, at 62,064 n.40 (2002), *petition for review granted in part and remanded, California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, 127 S. Ct. 2972 (2007). Then, in 2000 and 2001, prices in those markets and in the Pacific Northwest increased significantly. FERC has identified three factors that created a "perfect storm" that caused prices to increase in those regions: (1) "a lack of electricity supply in California," (2) "poor market

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[7] *See* FERC, *Staff Report to the Federal Energy Regulatory Commission on Western Markets and the Causes of the Summer 2000 Price Abnormalities* at 2-3 to 2-5 (Nov. 1, 2000) ("Staff 2000 Report").

rules," and (3) "market manipulation."[8] *See* Pet. App. 24a-25a.

In particular, market forces caused price increases as a response to scarcity, which, in combination with flaws in California's market design, had far-reaching consequences. Temperature extremes in California in the summer and fall of 2000, combined with an historic drought throughout the West, created increased demand, which was exacerbated by California's increased reliance on gas-fired generation resources that, at the time, were expensive and inefficient. *See* Staff 2000 Report at 2-9.[9] Those factors caused spot-market prices to rise, but, because of California's rate freeze, the IOUs were unable to pass their increased costs through to customers. *See* Staff Final Report at I-12; Initial Decision Dismissing Complaints, *PacifiCorp v. Reliant Energy Servs., Inc.*, 102 FERC ¶ 63,030, at 65,081 (ALJ, 2003). As a result, consumers were sheltered from the surging wholesale prices and failed to respond to the energy scarcity by conserving power.

Moreover, under California's regulatory scheme, the IOUs were hobbled by statutory and regulatory strictures that prevented them from contracting for power supplies in California's forward markets, forcing them to purchase power through California's organized spot markets to meet high customer de-

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[8] FERC, Open Commission Meeting Statement of Chairman Joseph T. Kelliher (Sept. 21, 2006); Order Proposing Remedies for California Wholesale Electric Markets, *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 93 FERC ¶ 61,121, at 61,353-55 (2000) (identifying the same three factors).

[9] *See also* FERC, *Final Report on Price Manipulation in Western Markets* at I-10 (Mar. 26, 2003) ("Staff Final Report").

mand.[10] *See* Pet. App. 24a. As a result, California's largest utilities were exposed to the extremes of the volatile spot market with almost no ability to hedge that risk through forward contracting. *See id.* In response, FERC issued an order in December 2000, urging IOUs "to move to long-term contracts of two years or more." *Id.* at 25a.

Faced with scarce resources, escalating wholesale prices, and state-mandated reliance on volatile spot markets, the IOUs reached financial crisis and ceased paying their financial obligations. *See* Joskow, 17 Oxford Rev. Econ. Pol'y at 383. Sellers, in turn, refused to sell electricity to the foundering companies. In early 2001, California's governor and legislature charged the California Energy Resources Scheduling ("CERS") Division of the California Department of Water Resources ("CDWR") with "mak[ing] power available directly or indirectly to electric consumers in California." Cal. Water Code § 80012 (West 2004). Exercising that authority under § 80100, CDWR acted to rectify imbalances in demand and supply on the electricity grid by entering into bilateral short-term and long-term contracts with energy sellers. Ultimately, electricity demand lessened and prices fell as the CPUC allowed retail rates to rise in June 2001, energy conservation increased, more efficient generating facili-

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[10] The IOUs were obliged to provide default electricity services during the rate-freeze period to customers who chose not to change services from the state-regulated utility to a competitive electricity service provider. When far fewer customers than expected chose to change services, the IOUs were forced to meet unexpected demand through purchases in the volatile spot markets. *See* Joskow, 17 Oxford Rev. Econ. Pol'y at 376-77.

ties began functioning, and the weather returned to normal levels.[11]

**After the Energy Crisis**

FERC issued a series of orders in the midst and wake of the energy crisis to help repair the damage caused by weather, adverse market circumstances, and the California legislature. *See* FERC, *Report to the United States Congress, The Commission's Response to the California Electricity Crisis and Timeline for Distribution of Refunds* at 7-19 (Dec. 27, 2005) ("FERC 2005 Report"); *infra* pp. 20-21. Subsequently, numerous California parties, including the major IOUs, separately petitioned FERC to order refunds for allegedly unjust and unreasonable rates charged in California and the Pacific Northwest during the energy crisis. Those petitions set in motion numerous FERC proceedings and orders.

FERC's various orders have spawned nearly 200 petitions for review in the Ninth Circuit. *See PUC*, 462 F.3d at 1034. That court made the administrative decision to assign more than 100 cases involving both the California and the Pacific Northwest markets to a single three-judge panel.[12] That panel is developing a burgeoning body of FPA precedent that has laid a broad foundation for the Ninth Circuit's energy-crisis jurisprudence. *See, e.g.*, Pet. App. 48a-49a. The decision below is one of the most recent products of that jurisprudence, yet one of the first

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[11] *See* Recommendations and Proposed Findings of Fact, *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale Into Electric Energy and/or Capacity Markets in the Pacific Northwest*, 96 FERC ¶ 63,044, at 65,341-42 (ALJ, 2001).

[12] *See* Order, *Public Utils. Comm'n v. FERC*, Nos. 01-71051, *et al.* (9th Cir. Oct. 22, 2004).

opportunities for this Court to review the Ninth Circuit's decisions in this area.

## SUMMARY OF ARGUMENT

**I.** In enacting the FPA, Congress sought to promote contractual certainty and market stability, as a means of "encourag[ing] the orderly development of plentiful supplies of electricity . . . at reasonable prices." *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976). To that end, the Act authorizes FERC to modify all rates prospectively, but provides only limited authority to order refunds on past sales.

**II.** Over the last 20 years, FERC has developed a market-based pricing system that has enabled the development of competitive, efficient wholesale-power markets. FERC imposed regulatory controls designed to prevent sellers from exercising market power and to assure that rates in those markets would be just and reasonable. During and after the energy crisis, FERC exercised its remedial authority under the FPA to mitigate the effects of the crisis, to provide relief to buyers consistent with the Act, and to reduce the possibility of a similar event occurring in the future.

**III.** In *Snohomish County* and other cases, the Ninth Circuit has micromanaged FERC's response to the energy crisis. The court has created a standardless "effective oversight" requirement – found nowhere in the statute – that the court uses to second-guess FERC's expert decisions. The end result is a radical expansion of sellers' potential refund liability and a concomitant reduction in contractual certainty and market stability.

**IV.** Unless this Court corrects the Ninth Circuit's erroneous course, its energy-crisis jurisprudence will

have dramatic destabilizing effects on all energy markets.

## ARGUMENT

### I. IN THE FPA, CONGRESS STRUCK AN APPROPRIATE BALANCE BETWEEN CONTRACTUAL CERTAINTY AND CONSUMER PROTECTION

Congress structured the FPA so that sophisticated wholesale buyers and sellers of electricity could negotiate reasonable rates, subject to FERC's later, discretionary review to ensure those rates are just and reasonable. *See Verizon Communications Inc. v. FCC*, 535 U.S. 467, 479 (2002). As the text, history, and policy of the FPA confirm, Congress purposefully limited FERC's refund authority in order to maintain contractual certainty and market stability.

#### A. The FPA's Statutory Framework Limits Refunds

The FPA "expressly recognizes that rates to particular customers" are "established initially by the [power] companies, by contract or otherwise," and that the Commission's role is largely supervisory. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 338, 341 (1956);[13] *see Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002) (describing FERC's role under the FPA as "essentially passive and reactive") (internal quotation marks omitted); *see also* 18 C.F.R. § 35.4 ("[t]he fact

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[13] Although *Mobile* involved the Natural Gas Act, 15 U.S.C. § 717 *et seq.* ("NGA"), this Court has noted that the FPA and the NGA "are in al material respects substantially identical." *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956). This brief follows the established practice of citing precedents under the NGA and the FPA interchangeably.

that [FERC] permits a rate schedule . . . to become effective shall not constitute approval by the Commission of such rate schedule"). FERC's role under the FPA generally is to review rates to ensure that they are just and reasonable, and, if they are not, to modify the rates going forward. *See* 16 U.S.C. § 824d(a); *id.* § 824e(a); *Mobile*, 350 U.S. at 341. Congress gave FERC authority to order refunds for unjust and unreasonable rates only in the narrow circumstances outlined in FPA § 205(e) and § 206(b).

Section 205(e) authorizes FERC, after initiating a hearing, to suspend a proposed rate change for up to five months to investigate whether it is just and reasonable. After that time, the proposed rate "shall go into effect," even if FERC has not concluded its investigation. 16 U.S.C. § 824d(e). However, if FERC ultimately determines that the previously suspended rate is unjust and unreasonable, it may order the seller to refund any unjustified "portion" of the rate charged after the suspension lifted. *Id.* Thus, § 205(e) gives FERC discretionary authority to suspend proposed rate changes not yet reviewed by FERC and to order refunds if those rates were charged and turn out to have been unjust and unreasonable. *See Mobile*, 350 U.S. at 341.

Similarly, under § 206(b), FERC has discretion to order refunds when it determines that an initial or existing rate is unjust, unreasonable, or unduly discriminatory. FERC may order a seller to refund the difference between the existing rate and the rate that FERC determines is just and reasonable, *see* 16 U.S.C. § 824e(b), though FERC's refund authority is

confined to those sales that occurred after the statutory "refund effective date."[14]

Thus, under both § 205(e) and § 206(b), FERC has only limited authority to order refunds, and even then its authority is discretionary.[15] Moreover, sellers always have advance notice when they could face refund liability for charging the rate on file with the Commission, because of the suspension period required before FERC may order § 205(e) refunds, and because of the "refund effective date" before which FERC may not order § 206(b) refunds.[16] By denying refunds for unjust and unreasonable rates in all other circumstances, the statute's text and structure

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[14] At the time relevant here, the "refund effective date" could be no earlier than 60 days after either the filing of the complaint or the publication of FERC's decision to initiate an investigation. *See* 16 U.S.C. § 824e(b) (2000).

[15] Unlike § 205 and § 206, § 309 does not authorize FERC to award refunds on a complaint. Instead, the provision provides FERC alone with discretionary enforcement authority "to perform any and all acts . . . it may find necessary or appropriate to carry out" the FPA's other provisions. 16 U.S.C. § 825h. Courts have stated that § 309 permits FERC to order remedies when a seller has violated its federal tariff. *See Consolidated Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 967 (D.C. Cir. 2003). Section 309 does not authorize FERC to circumvent the limitations of § 205 and § 206. *See FPC v. Texaco Inc.*, 417 U.S. 380, 394 (1974) (prohibiting use of FERC's "necessary or appropriate" power to "set at naught an explicit provision of the Act"). Thus, FERC cannot use § 309 to remedy rates determined to be unjust and unreasonable under § 206. *See San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 96 FERC ¶ 61,120, at 61,509-10 (2001).

[16] In contrast, because sellers cannot have a reasonable expectation of contractual certainty when they violate their tariffs on file with the Commission, they are not entitled to advance notice if FERC orders retroactive relief under § 309 to remedy tariff violations. *See supra* note 15.

make clear that buyers frequently cannot obtain relief when FERC later determines that the seller charged an unjust and unreasonable price.

### B. The FPA's Legislative History And Judicial Interpretation Confirm That Limited Refunds Best Serve The Market

The FPA's legislative history and cases interpreting the Act support that understanding of FERC's limited refund authority.

Congress has thrice addressed FERC's power to order refunds for past sales, and each time it confined FERC's refund authority to the limited circumstances in which § 205(e) and § 206(b) apply. When Congress enacted the FPA in 1935, it specifically eliminated a section that would have authorized "the issuance of reparation orders." S. Rep. No. 74-621, at 20 (1935). When Congress decided to authorize refunds under FPA § 206 in 1988, it only allowed them prospectively from a "refund effective date" no sooner than 60 days after either the filing of the complaint or the publication of FERC's decision to initiate an investigation. *See* Regulatory Fairness Act, Pub. L. No. 100-473, § 2, 102 Stat. 2299, 2299-2300 (1988). And, when Congress revisited § 206(b)'s "refund effective date" clause in 2005, it rejected a proposed amendment that would have authorized the Commission "to issue orders requiring refunds for all electricity overcharges." 151 Cong. Rec. H2332 (daily ed. Apr. 20, 2005) (statement of Rep. Dingell); *see id.* at H2380 (rejecting Rep. Dingell's amendment).

Consistent with the FPA's text and history, courts have repeatedly recognized that refunds under the FPA are limited to the narrow circumstances outlined in § 205(e) and § 206(b). *See, e.g., Consolidated Edison*, 347 F.3d at 968-69 (affirming that FERC has

no authority to order "retroactive relief under FPA section 205"); *Northwest Pipeline Corp. v. FERC*, 61 F.3d 1479, 1488 (10th Cir. 1995) ("[A]ny relief from an unjust rate ordered by the Commission is *prospective only*; it may not have retroactive effect.") (emphasis added).[17]

### C. Limiting Refunds Ensures Market Stability

The reason for limiting refunds for past sales is rooted in the filed-rate doctrine, which generally prohibits FERC from imposing a rate increase or decrease for power already sold. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 576-78 (1981) (explaining the doctrine). By "authorizing only prospective rate changes," *Consolidated Edison*, 347 F.3d at 969, the filed-rate doctrine guarantees to sellers "a right to rely on the legality of the filed rate," *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 189 n.7 (D.C. Cir. 1986) (Ginsburg, R.B., J.), until FERC finds the filed rate unlawful and determines a rate "to be thereafter observed and in force" under § 206, 16 U.S.C. § 824e(a). In doing so, the filed-rate doctrine creates contractual certainty and market stability. As FERC has recognized, ordering refunds can

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[17] *See also Distrigas of Massachusetts Corp. v. FERC*, 737 F.2d 1208, 1221 (1st Cir. 1984) (Breyer, J.) ("Neither section 4 nor section 5 [of the NGA] authorizes the Commission to make adjustments or to order refunds to compensate customers for *past* excessive charges by the utility – *i.e.*, charges made prior to the time a proposed rate increase took effect; both are directed only at the reasonableness of prospective or increased rates."); *Cooperative Power Ass'n v. FERC*, 733 F.2d 577, 580 (8th Cir. 1984) (per curiam) ("Congress anticipated cases in which rates would be found unreasonable, and subject to future adjustment, but would *not be subject to refund*" under the FPA) (emphasis added).

"create an unacceptable amount of risk and uncertainty for future market participants in the [West], since it would set a precedent that the contract price for power may always be subject to change – without any advanced warning."[18]

## II. FERC ACTIVELY SUPERVISED ELECTRICITY MARKETS BEFORE, DURING, AND AFTER THE ENERGY CRISIS

Congress has given FERC wide latitude in executing its supervisory role over electricity markets. *See In re Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968) ("[T]he breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties."). FERC's supervision of power markets has evolved, keeping apace with the nation's changing energy needs. Although the energy crisis tested FERC's supervisory decisionmaking, and not all of its orders were correct, the Commission nonetheless made numerous sound judgments that the Ninth Circuit has inappropriately vacated.

### A. FERC Actively Supervised Power Markets Leading Up To The Energy Crisis

Historically, electric utilities charged fixed wholesale rates based on the cost of providing service plus

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[18] Order Denying Rehearing, *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale Into Electric Energy and/or Capacity Markets in the Pacific Northwest*, 105 FERC ¶ 61,183, at 61,965, ¶ 54 (2003), *petitions for review granted in part, denied in part, and remanded, Port of Seattle v. FERC*, 499 F.3d 1016, 1035-36 (9th Cir. 2007).

a reasonable return on investment.[19] *See* Pet. App. 14a-15a. In the early 1970s, FERC started allowing sellers to file tariffs containing formula rates, which specified the cost components of the rate; under those tariffs, rates changed as costs fluctuated. *See Public Utils. Comm'n v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001). Later, FERC began approving tariffs under which rates would be set in the market to develop competitive bulk power markets. *See, e.g., Citizens Power & Light Corp.*, 48 FERC ¶ 61,210 (1989); *see also* Pet. App. 17a-18a.

FERC built three different oversight mechanisms into its market-based rate regime to ensure that utilities that sell electricity at market-based rates do not develop market power and thereby harm competition: (1) a rigorous application process, (2) regular transaction reporting to FERC, and (3) a triennial market-power review.

*First*, FERC required each potential seller to file an application to transact at market-based rates, notified the public of the application, and accepted public comments on it. *E.g., TransAlta Enters. Corp.*, 75 FERC ¶ 61,268, at 61,874 (1996). The Commission would approve such applications "only if the seller and its affiliates d[id] not have, or adequately ha[d] mitigated, market power in the generation and transmission of such energy, and [could ]not erect other barriers to entry by potential competitors." *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d

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[19] *See generally* Final Rule, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540, 21,543-46 (May 10, 1996) (recounting the historical development of the electric energy industry).

364, 365-66 (D.C. Cir. 1998) ("*LEPA*") (citing cases; footnote omitted). Once FERC decided that the seller met the Commission's requirements, it accepted the application and issued an order, of which aggrieved parties could obtain judicial review. *See, e.g., id.* at 366-69; *see also Dynegy*, 384 F.3d at 760 (market-based rate tariff "preauthorizes the seller to engage in market-based sales and puts the public on notice that the seller may do so") (internal quotation marks omitted). FERC's determination that a seller lacked market power – a determination that was made before the seller could conduct *any* transactions at market-based rates – established that market discipline would assure that the seller's rates are just and reasonable.[20]

*Second*, FERC's orders granting authority to sell at market-based rates generally required an applicant to file "quarterly reports" summarizing its transactions during the preceding three months. *See Dynegy*, 384 F.3d at 760. FERC used that information to oversee activity in the market and reassess its conclusion that a particular seller lacked, or had mitigated, market power. *See id.* at 760-61. *Third*, the Commission also required sellers either to inform it of any changes implicating their ability to exercise

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[20] *See LEPA*, 141 F.3d at 365 ("Where there is a competitive market, [FERC] may rely on market-based rates in lieu of cost-of-service regulation to ensure that rates satisfy [§ 205(a)'s just-and-reasonable-rate] requirement."); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) (same); *see also Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) ("In a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that price is close to marginal cost, such that the seller makes only a normal return on its investment.").

market power or to file a new analysis of their market power every three years. *E.g.*, *GPU Advanced Res., Inc.*, 80 FERC ¶ 61,255, at 61,928 (1997).

Beyond those requirements, FERC exercised its authority to review rates under § 206. FERC analyzed sellers' quarterly transaction reports to determine whether a seller's market-based rates had become unjust and unreasonable. *See Citizens Power & Light*, 48 FERC at 61,779. If that occurred, FERC could order modifications to the seller's tariff (including revoking the seller's market-based rate authority, as it did in the case of Enron[21]) and require a seller to pay refunds under § 206.[22]

The fact that FERC required prior approval before sellers could transact at market-based rates was a significant departure from the minimum requirements imposed by the FPA, which does not require pre-approval for rates to take effect. *See supra* pp. 11-12. In combination with its ongoing supervisory powers under § 206, FERC's prior determination that a particular seller's market-based rates were just and reasonable more than satisfied FERC's obligation to supervise market participants. *See LEPA*, 141 F.3d at 370-71 (concluding that § 206 is an "appropriate safeguard" when there is no reason to doubt FERC's pre-approval conclusion that sellers lack, or have mitigated, market power); *see also PUC v. FERC*, 254 F.3d at 255 (holding "that the Commission could properly rely on a previously approved

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[21] *E.g.*, Order Revoking Market-Based Rate Authorities and Terminating Blanket Marketing Certificates, *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,343 (2003), *reh'g denied*, 106 FERC ¶ 61,024 (2004).

[22] *See Lockyer v. British Columbia Power Exch.*, 99 FERC at 62,064.

formula rate and § 206 proceedings to ensure just and reasonable rates").

### B. FERC's Post-Crisis Regulatory Oversight Showed An Expeditious Response

In the wake of the energy crisis, FERC acted quickly and competently to restore stability to Western markets as soon as possible, while still maintaining the careful balance that Congress struck between consumer protection and contractual certainty.

Beginning in November 2000, FERC issued a series of orders that: proposed key structural remedies for California's wholesale markets[23]; found and established remedies designed to rectify structural flaws in the ISO's and PX's single price auction markets that, in conjunction with an imbalance of supply and demand, caused unjust and unreasonable rates for short-term energy under certain conditions[24]; adopted an immediate price mitigation framework for sales in the ISO's market[25]; and adopted in part and modified in part FERC Staff's proposal for long-term price mitigation for sales in the ISO's market[26] and in other spot markets throughout the West.[27]

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[23] *See San Diego Gas & Elec.*, 93 FERC at 61,370.

[24] *See San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 93 FERC ¶ 61,294 (2000).

[25] *See, e.g., San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 94 FERC ¶ 61,245 (2001).

[26] *See San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 95 FERC ¶ 61,115 (2001), *petition for review granted in part, denied in part, and remanded, California Dep't of Water Res. v. FERC*, 341 F.3d 906 (9th Cir. 2003).

[27] *See San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 95 FERC ¶ 61,418 (2001), *petition for review granted in part, denied in part, and remanded, California Dep't of Water Res. v. FERC*, 341 F.3d 906 (9th Cir. 2003).

The Commission has continued to oversee Western energy markets and issue orders as necessary, even years later. FERC has mandated structural reforms of California's energy markets and has issued rules proscribing manipulative market behavior.[28] FERC also is in the process of adjudicating a complex investigation to determine the extent to which sellers of energy will be ordered to pay refunds for sales into the California organized spot markets at prices exceeding just and reasonable rates.[29] FERC has investigated allegations of market manipulation by sellers.[30] Many of those investigations have been resolved without any finding of wrongdoing.[31] A number of sellers in the market did not have any allegations of wrongdoing brought against them.

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[28] *See* Final Rule, *Conditions for Public Utility Market-Based Rate Authorization Holders*, Order No. 674, 114 FERC ¶ 61,163 (2006); Final Rule, *Prohibition of Energy Market Manipulation*, Order No. 670, 114 FERC ¶ 61,047 (2006); FERC 2005 Report at 4 & n.5, 8.

[29] *PUC v. FERC* (462 F.3d 1027) addressed issues arising from that proceeding.

[30] *See* Order Directing Staff Investigation, *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002); Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior, *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003); Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior Through the Use of Partnerships, Alliances or Other Arrangements and Directing Submission of Information, *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003).

[31] *See, e.g.*, Order on Motion to Dismiss Show Cause Proceeding, *Public Serv. Co. of New Mexico*, 112 FERC ¶ 61,033 (2005); Order Approving Contested Settlement Agreement, *Powerex Corp.*, 106 FERC ¶ 61,304 (2004).

## III. THE DECISION BELOW IS THE RESULT OF A GROWING BODY OF FLAWED NINTH CIRCUIT FPA JURISPRUDENCE

### A. *Snohomish County* Is Founded On Two Erroneous Principles Regarding The FPA And FERC's Administrative Role Under The FPA

In *Snohomish County*, the Ninth Circuit held that FERC erroneously applied the *Mobile-Sierra* doctrine to "forward" contracts that now-remorseful purchasers executed when prices in California's short-term energy markets were unusually high. In vacating the Commission's orders and remanding to the agency, the court relied on two erroneous principles that have become cornerstones of the Ninth Circuit's flawed energy-crisis jurisprudence.

*First*, the court held that the *Mobile-Sierra* doctrine does not apply to long-term contracts at market-based rates absent "effective oversight" by FERC over the market. *See* Pet. App. 48a-49a. According to the Ninth Circuit, to be "effective," FERC must "review whether contracts . . . are just and reasonable before they are entered," "based on the market circumstances that prevail[] at the times the contracts [are] negotiated," *id.* at 53a, regardless of FERC's prior conclusion that the seller lacks market power and should be permitted to sell at market-based rates. The court acknowledged that this requirement comes not from the FPA or this Court's cases, but from *Lockyer v. FERC* – one of the Ninth Circuit's first energy-crisis cases. *See id.* at 48a. As applied by the Ninth Circuit, the "effective oversight" requirement is inconsistent with the wide latitude Congress gave FERC in executing its supervisory role over power markets and market participants.

*See supra* p. 16. Instead of recognizing FERC's extensive efforts to stabilize markets during and after the energy crisis and deferring to FERC's expertise, the court second-guessed the Commission and remanded to the agency with instructions to reconsider whether to apply the *Mobile-Sierra* doctrine as revised by the Ninth Circuit. *See* Pet. App. 66a.

*Second*, the court declared that FERC has a "statutory responsibility under the FPA to ensure that *all* rates, including bilateral contract rates, are 'just and reasonable,'" *id.* at 57a, and that the "'FPA cannot be construed to immunize those who overcharge and manipulate markets in violation of the FPA,'" *id.* at 48a (quoting *Lockyer*, 383 F.3d at 1017). But, as explained above, absent specific tariff violations, Congress expressly and consciously eliminated FERC's authority to order refunds for rates charged prior to the statutory refund period. The Ninth Circuit's for-every-unjust-rate-a-remedy approach to the FPA led the court to bestow on FERC an unprecedented power to abrogate voluntary, bilateral contracts under § 206, and, in exercising that power, to "give *predominant weight* . . . to the impact . . . on the rates paid by the consuming public who use the energy covered by the [challenged] contract." *Id.* at 61a (emphasis added). In doing so, the court upset the careful balance that Congress struck in the FPA between contractual certainty and consumer protection.

### B. The Decision Below Is An Extension Of The Ninth Circuit's Erroneous FPA Jurisprudence Arising Out Of The Energy Crisis

The Ninth Circuit derived the erroneous principles in *Snohomish County* from the flawed foundation of *Lockyer*. *See* Pet. App. 47a, 48a (recognizing *Lockyer*

as "critically important" to establishing the "effective oversight" requirement). *Lockyer*, moreover, has spawned similar, egregious errors in *PUC* and *Port of Seattle*, each of which has applied the functional equivalent of the "effective oversight" requirement to second-guess the agency's fact-finding and to expand impermissibly FERC's limited refund authority under the FPA. Unless this Court applies its corrective hand, the Ninth Circuit will continue to apply its erroneous principles to pending energy-crisis cases.

### 1. *Lockyer v. FERC*

In *Lockyer*, the Ninth Circuit first demonstrated that, in evaluating FERC's market oversight, the court will not defer to FERC's administrative expertise, especially if the court is able to expand potential refund liability.

After the court correctly upheld the facial validity of FERC's market-based rate regime under § 205, *see* 383 F.3d at 1011-13, the court held that FERC erred in concluding that it lacked authority to order retroactive refunds for certain "prohibited schemes"[32] that some California parties alleged went undetected by FERC because of sellers' inadequate reporting, *see id.* at 1010, 1014. FERC had rejected the legal basis for that claim because it cannot order retroactive refunds under FPA § 205(e), and FERC had rejected the factual basis for that claim because the parties failed to show any connection between sellers' reporting inadequacies and the alleged "prohibited

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[32] Order Denying Rehearing, *California ex rel. Lockyer v. British Columbia Power Exch. Corp.*, 100 FERC ¶ 61,295, at 62,334-35 (2002) ("*Lockyer Rehearing Order*"), *petition for review granted in part and remanded, California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, 127 S. Ct. 2972 (2007).

schemes" purportedly giving rise to refund liability. *See Lockyer Rehearing Order*, 100 FERC at 62,334-35.

The Ninth Circuit rejected both of FERC's explanations. On the law, the court held that FERC has authority to order retroactive refunds under FPA § 205 when wholesale sellers of electricity fail to report on a quarterly basis transaction-specific data of all their sales at market-based rates. *See Lockyer*, 383 F.3d at 1015-17; *see also PUC*, 462 F.3d at 1045 (describing *Lockyer* as holding "that FERC erred as a matter of law in concluding retroactive refunds were not available under § 205"). The panel found "[t]he power to order retroactive refunds" to be "inherent in FERC's authority to approve a market-based tariff in the first instance." 383 F.3d at 1016. In fact, the *Lockyer* panel was so determined to allow refunds that it read *into sellers' tariffs "implied enforcement mechanisms sufficient to provide substitute remedies* for the obtaining of refunds for the imposition of unjust, unreasonable and discriminatory rates." *Id.* (emphasis added). As explained above, that result is contrary to the FPA, its history, and this Court's jurisprudence. It also undermines the filed-rate doctrine.

As for FERC's factual basis for denying refunds, the court did not even evaluate FERC's explanation for its decision. Rather, the court simply remanded for the Commission "to reconsider its remedial options in the first instance." *Id.* at 1018. In doing so, the Ninth Circuit did not afford FERC the discretion that courts normally do when reviewing a remedy fashioned by an agency. *Compare Tennessee Gas Pipeline Co. v. FERC*, 400 F.3d 23, 25 (D.C. Cir. 2005) ("the breadth of agency discretion is, if any-

thing, at [its] zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions") (alterations in original; internal quotation marks omitted).

**2. *PUC v. FERC***

In *PUC*, the Ninth Circuit evaluated "numerous questions pertaining to the proper scope of FERC's refund orders, including the appropriate temporal reach and the type of transactions properly subject to the refund orders" arising from California transactions. 462 F.3d at 1035. FERC issued the challenged "refund orders" after conducting a two-and-a-half-year § 206 investigation of California's energy markets. Despite upholding some of FERC's judgments, the Ninth Circuit rejected much of FERC's reasoning, expanded the scope of the California refund proceeding, and, as in *Lockyer*, remanded to the agency to evaluate whether additional refunds should be awarded. *See id.*

As in *Lockyer* and *Snohomish County*, the Ninth Circuit in *PUC* intruded into matters firmly within FERC's administrative discretion in order to expand potential refund liability. After FERC's § 206 investigation was well underway, some complaining parties made new allegations of tariff violations and sought additional remedies in the California refund proceeding. *See id.* at 1044. Because FERC was already investigating similar allegations, and because evaluating duplicative tariff-violation claims in FERC's § 206 proceeding would unduly complicate and delay that proceeding, the Commission declined to consolidate the two investigations. *See id.* at 1043,

1048-49.[33] The Ninth Circuit panel, however, ignored FERC's explanations and rejected the agency's decision to structure its docket this way, holding that FERC must "consider a § 309 remedy for tariff violations" as part of its § 206 investigation. *Id.* at 1048. The panel disregarded well-settled precedent in this Court and other circuits that courts cannot interfere with an agency's decisions regarding how best to structure its administrative proceedings. *See Mobil Oil Exploration & Producing Southeast Inc. v. United Distribution Cos.*, 498 U.S. 211, 230-31 (1991) ("[a]n agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities," and "need not solve every problem before it in the same proceeding").[34]

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[33] *See also* Order Denying Consolidation and Granting Protective Order, *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 103 FERC ¶ 61,359, at 62,480 (2003) (explaining that "consolidation would be highly inefficient and costly" and that "[c]onsolidation would only act to delay more advanced proceedings and the resolution of discrete issues").

[34] *See, e.g., Colorado Office of Consumer Counsel v. FERC*, 490 F.3d 954, 956-57 (D.C. Cir. 2007) (per curiam) (holding that § 206(a)'s express mandate that FERC "specify the issues to be adjudicated" forecloses expansion of a § 206 proceeding beyond the discrete issues FERC identifies and addresses), *petition for cert. pending* (U.S. filed Nov. 19, 2007; not yet docketed); *Aviators for Safe & Fairer Regulation, Inc. v. FAA*, 221 F.3d 222, 231 (1st Cir. 2000) ("[A]gencies are not normally required to solve all similar problems at one time."); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 767 (6th Cir. 1995) ("[A]gencies ordinarily may proceed one step at a time when addressing large, complicated issues."); *City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989) ("[s]ince agencies have great discretion to treat a problem partially, we would not strike down the [agency's decision] if it were a first step toward a complete solution, even if we thought [the agency] 'should' have covered both" issues in the same order) (footnote omitted); *New Orleans Pub.*

Beyond interfering with FERC's docket, the panel, in its eagerness to award refunds, read too broadly § 309's role in the FPA's remedial scheme. Section 309 grants FERC alone discretion to enforce the FPA's provisions. *See* 16 U.S.C. § 825h; *see also supra* note 15 (discussing § 309). The *PUC* panel ignored that fact and held that FERC does not have enforcement discretion, but *must* "adjudicate" any claim "that tariffs have been violated." 462 F.3d at 1051; *see also Pacific Gas & Elec. Co. v. FERC*, 464 F.3d 861, 867 n.4 (9th Cir. 2006) (discussing the "duty to adjudicate" created by the panel in *PUC v. FERC*).[35] As a result, the panel ordered FERC to "address the merits" of parties' purported claims for § 309 relief, even though the FPA imposes no such requirement. *See* 462 F.3d at 1051.[36]

### 3. *Port of Seattle v. FERC*

In *Port of Seattle*, the Ninth Circuit reviewed FERC's decision "to deny refunds to wholesale buyers of electricity that purchased energy" in the Pacific Northwest "short-term supply market." 499 F.3d at 1022. As in the predecessor cases, the panel gave inadequate deference to FERC in order to expand

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*Serv., Inc. v. FERC*, 659 F.2d 509, 516 (5th Cir. 1981) ("We view the decision whether or not to consolidate cases as a matter solely within the discretion of the Commission.").

[35] In the underlying order, FERC explained this limit on its power under § 309. *See San Diego Gas & Elec.*, 96 FERC at 61,509-10.

[36] In fact, the record in *PUC* is devoid of any complaint or other adjudicative filing requesting § 309 relief, as has recently been pointed out to the Ninth Circuit on rehearing. *See* Petition of Powerex Corp., *et al.*, for Rehearing and Suggestion for Rehearing En Banc at 11-15, *Public Utils. Comm'n v. FERC*, Nos. 01-71051, *et al.* (9th Cir. filed Nov. 16, 2007).

potential refund liability to purchasers of wholesale electricity.

FERC denied refunds in the PNW refund proceeding because various equitable considerations – such as the unfairness of awarding refunds to parties that imprudently relied on the spot market for their energy needs – counseled against awarding refunds, regardless of whether rates were unjust and unreasonable.[37] *See id.* at 1025-26. On petition for review, rather than determine whether FERC properly exercised its discretion, the Court ignored FERC's decision, expanded the scope of the refund proceeding (as in *PUC*), and (as in *Lockyer*) remanded to the agency, "urg[ing] the Commission to further consider its [refund] decision . . . in light of the related decisions of [the Ninth Circuit]." *Id.* at 1036.

The panel also gave no deference to FERC's reasoned interpretation of the administrative complaint that initiated the PNW refund proceeding – another matter firmly within the agency's discretion. The complaint asked FERC to impose price caps on power being sold and used in the Pacific Northwest.[38]

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[37] *See Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale Into Electric Energy and/or Capacity Markets in the Pacific Northwest*, 103 FERC ¶ 61,348, at 62,367-69 (2003), *petitions for review granted in part, denied in part, and remanded, Port of Seattle v. FERC*, 499 F.3d 1016 (9th Cir. 2007).

[38] Puget, the complaining party, was in the unenviable position of purchasing power in uncapped markets and selling power into California's capped markets. As Puget put it: "The effect of such disparate treatment is to expose wholesale purchasers such as [Puget] in the Pacific Northwest to uncapped prices when they need power (e.g., to meet winter demand) and yet hobble their ability to offset the costs of such purchases with uncapped prices when they have surplus power (e.g., due to favorable hydro-electric generation conditions) for

Certain California parties asked FERC to include in the PNW refund proceeding certain CERS transactions that involved electricity purchases for use in *California*. *See id.* at 1032; *supra* p. 8. FERC excluded the CERS transactions because they were beyond the scope of the initiating complaint, as the complainant itself maintained.[39] The Ninth Circuit, however, ordered FERC to include the CERS transactions in the PNW refund proceeding. *See* 499 F.3d at 1033-34.[40] That holding disregarded settled administrative law that courts must defer to an agency's reasonable interpretation of a complaint, where that interpretation is consistent with the overall thrust of the complaint, as FERC's was. *See, e.g., Burlington Northern R.R. v. ICC*, 985 F.2d 589, 594-95 (D.C. Cir. 1993); *American Fed'n of Gov't Employees v. FLRA*, 796 F.2d 530, 533 (D.C. Cir. 1986). In fact, *amici* are aware of no other case in which a court rejected as arbitrary and capricious an agency's interpretation of a complaint that was consistent with the complaining party's interpretation. The Ninth Circuit's decision in *Port of*

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sale to California." Complaint of Puget Sound Energy, Inc. at 10, Docket No. EL01-10-000 (FERC filed Oct. 26, 2000).

[39] *See Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale Into Electric Energy and/or Capacity Markets in the Pacific Northwest*, 106 FERC ¶ 61,109, at 61,368 (2004), *petitions for review granted in part, denied in part, and remanded, Port of Seattle v. FERC*, 499 F.3d 1016 (9th Cir. 2007).

[40] The Ninth Circuit's purported basis for doing so was two sentences in the complaint's introduction, which, taken out of context, the court thought could be interpreted as including the CERS transactions in the scope of the complaint. *See* 499 F.3d at 1033-34. However, neither the factual record nor the overall context of the complaint supports that reading.

*Seattle*, therefore, is another example of unwarranted judicial intrusion into FERC's authority that has become a hallmark of the Ninth Circuit's recent energy-crisis jurisprudence.

As these cases demonstrate, what the Ninth Circuit calls "effective oversight" is not oversight at all – it is a standardless judicial intrusion into an agency's expertise and the regular activities of sophisticated market participants in order to maximize the potential for refunds. However one might describe FERC's "review powers" under the FPA, the Ninth Circuit has taken a flatly inconsistent approach with this Court's FPA jurisprudence. Under the Ninth Circuit's erroneous holdings, FERC must re-evaluate sophisticated parties' voluntary bargains and revise them after-the-fact (*Snohomish County*), reconsider whether to order refunds where there is no factual basis for doing so (*Lockyer*), combine administrative proceedings when it would be more efficient to keep them separate (*PUC*), and include in a refund proceeding claims that are clearly beyond the scope of the complaint (*Port of Seattle*).

## IV. THE ECONOMIC CONSEQUENCES OF THE NINTH CIRCUIT'S ENERGY-CRISIS JURISPRUDENCE WILL BE DISASTROUS FOR THE NATION'S ENERGY MARKETS

The Ninth Circuit has consistently applied its standardless "effective oversight" requirement to open the door for retroactive refunds at the expense of market stability. That erroneous application of a flawed legal "principle" will have significant, negative impacts on the nation's electricity markets.

### A. The Ninth Circuit's Standardless Judicial Intrusion Into Power Markets Threatens To Disrupt Markets For Wholesale Power

Given the volatility of wholesale electricity prices, there is always a potential for buyer's or seller's remorse associated with long-term contracts. As a consequence of the Ninth Circuit's "effective oversight" requirement as applied in *Snohomish County*, remorseful buyers now have the avenue to argue – long after power has been delivered – that markets were dysfunctional at the contract's inception. *See* Pet. App. 57a-58a. *Snohomish County*'s application of the *Lockyer* court's "oversight" requirement to forward contracts means that a seller can never be certain that a price will not later be found unjust and unreasonable, making past sales subject to refund and forward contracts potentially unenforceable.[41]

Instead of investing earnings in generation and transmission facilities to increase the supply of power, prudent sellers will carry reserves to insure against retrospective rate-setting, contract abrogation, and refunds. They also will build a "significant risk premium" into every contract, increasing the cost of power to consumers. *See, e.g.*, Proposed Policy Statement, *Standard of Review for Proposed Changes to Market-Based Rate Contracts for Wholesale Sales of Electric Energy by Public Utilities*, 67 Fed. Reg. 51,516, 51,519, ¶ 3 (Aug. 8, 2002) (Brownell & Breathitt, Comm'rs, concurring). But, as FERC has explained to Congress, new investment is precisely

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[41] Indeed, parties have already filed § 206 complaints invoking *Snohomish County* and asking FERC to abrogate contracts formed during the energy crisis. *See, e.g.*, Section 206 Complaint of CAlifornians for Renewable Energy, Inc. at 1-2, Docket No. EL07-37-000 (FERC filed Feb. 22, 2007).

what California and other Western States desperately need to avoid supply shortages and further price shocks.[42]

### B. The Ninth Circuit's Standardless Judicial Intrusion Into Power Markets Undermines FERC's Market-Based Rate Regime

The Ninth Circuit's "effective oversight" jurisprudence also threatens FERC's market-based rate regime, which is widely regarded as beneficial to consumers. Diverse groups have explained to the Commission that they "are convinced that properly structured regional wholesale electricity markets . . . can provide net benefits to customers and promote critical national goals related to fuel diversity, energy security, and environmental protection."[43]

Under the Ninth Circuit's approach, it may be impossible for FERC to continue a successful market-based rate regime because the Ninth Circuit functionally requires advance approval of specific transactions. FERC's historical approach to market-based rates – finding a lack of market power at the outset with regular reporting and oversight thereafter to ensure continued lack of market power – facilitated tens of thousands of market-based wholesale transactions without requiring FERC to evaluate and approve specific prices and contracts in advance.

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[42] *See* FERC 2005 Report at 14 ("[R]estoring confidence in California markets is critical to motivating future investment in transmission and generation facilities necessary to the long-term health and competitiveness of the wholesale electricity market.").

[43] Letter from Robert Gramlich, American Wind Energy Association (on behalf of numerous groups), to Hon. Joseph T. Kelliher, Chairman, FERC, at 1 (Feb. 26, 2007), *available at* http://www.paenergynews.com/pdfs/letter_kelliher022807.pdf.

The Ninth Circuit's requirement that FERC consider "market conditions at the time a challenged forward contract was entered" as a means of ensuring the regulatory certainty of the *Mobile-Sierra* doctrine, Pet. App. 52a, potentially cripples that market-based rate regime. As FERC has recognized, if it "were required to examine every long-term service agreement as if the seller [were] seeking new market-based rate authority, it would make the original grant of authority a pointless exercise of no value to anyone." *Public Utils. Comm'n v. Sellers of Long Term Contracts*, 105 FERC ¶ 61,182, at 61,944, ¶ 34 (2003). And what is "pointless" in connection with long-term contracts is both pointless and impossible in short-term and spot markets, for which requiring advance regulatory approval of contracts and prices would swamp FERC's resources and make impossible the timely execution of the volume of trades required to sustain a competitive and liquid market.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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